United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The ELMO DIVISION of DRIVE-X COMPANY, INC., et al., Appellants, vs. PAUL RAND DIXON, the FEDERAL TRADE COMMISSION, et al., Appellees.	No. 18,559

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APPEAL FROM FINAL JUDGMENT
DISMISSING COMPLAINT FOR LACK OF
JURISDICTION TO GRANT THE RELIEF PRAYED

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May 25, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The ELMO DIVISION of DRIVE-X COMPANY, INC., CRAIG SANDAHL, and RICHARD JOHANN,	)	
Appellants,	)	
vs.	)	No. 18,559
PAUL RAND DIXON, SIGURD ANDERSON, PHILIP ELMAN, A. EVERETTE MacINTYRE, JOHN R. REILLY, and The FEDERAL TRADE COMMISSION,	)	
Appellees.	)	

APPEAL FROM FINAL JUDGMENT
DISMISSING COMPLAINT FOR LACK OF
JURISDICTION TO GRANT THE RELIEF PRAYED

STATEMENT OF QUESTION PRESENTED

Whether the District Court lacked jurisdiction to require the Federal Trade Commission to withdraw a de novo proceeding against appellants and instead proceed under the reopening procedure defined in §5(b) of the Federal Trade Commission Act, a procedure which had also been the subject of an agreement between the Commission and the appellants in a prior cease and desist order issued by the Commission on the same charges.

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JURISDICTIONAL STATEMENT

The individual appellants are officers of the corporate appellant, an Iowa corporation, which, with its corporate predecessor, the Elmo Company, Inc., is referred to herein as ELMO. The individual appellees are the Chairman and Commissioners of the Federal Trade Commission and were named in the Complaint in their official capacity upon a cause of action arising under 28 U.S.C. §1361, 15 U.S.C. §45 and regulations promulgated thereunder. The Commission was also named in the Complaint as defendant upon a cause of action for the review of arbitrary administrative action under §10 of the Administrative Procedure Act (15 U.S.C. §1009). Appellees are hereinafter collectively referred to as the Commission.

Appellants prayed a judgment of the United States District Court for the District of Columbia pursuant to 28 U.S.C. §2201 declarative of the rights of the parties together with a mandatory order of that Court pursuant to 5 U.S.C. §1009(e), 28 U.S.C. §§1651 and 2202, to require the Commission to withdraw a second complaint filed against ELMO and to follow the procedure provided in the Federal Trade Commission Act for reopening procedures under its Rule V(f).

The Complaint for Declaratory Relief adequately shows the facts determinative of the jurisdiction of the District Court, and, dismissal having been made for lack of such jurisdiction, all properly pleaded averments therein are established for the purposes of this appeal, United States v. McCabe

Co., 261 F. 2d 539, 544 (C.A. 8, 1959).

The Order of the District Court dismissing the Complaint for lack of jurisdiction was entered on April 15, 1964. The jurisdiction of this Court arises under 28 U.S.C. §1291.

STATEMENT OF THE CASE

The Federal Trade Commission Act

The Federal Trade Commission Act grants powers to the Federal Trade Commission to prohibit unfair methods of competition or deceptive acts or practices in commerce (15 U.S.C. §45(a)) and to proceed against these by complaint and hearing to the issuance of a cease and desist order (15 U.S.C. §45(b)). Such orders are made reviewable in this Court (§5(c)), and become final and binding after the expiration of the time allowed for filing such a petition for review with the presently important exception (15 U.S.C. §45(g)(1)):

> ". . .but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b);. . .."

The last sentence of subsection (b) which is there referred to reads as follows (15 U.S.C. §45(b)):

> "After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

The Federal Trade Commission Rules

Rule V(f) of the Commission's Rules of Practice in effect in 1952 directly repeats the statutory requirement and provides, in pertinent part:

> ". . .the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings. . . ." (App._____).

The statutory requirement of hearing and review for the reopening of proceedings is presently to be found as Subpart H of the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §3.28(b)(infra p. 9).

The Two Proceedings

ELMO at all relevant times advertised and sold proprietary medicines. On June 10, 1952, after the appellee Commission complained of certain features of ELMO's advertising, and initiated a proceeding by complaint under 5(b) of the Act (15 U.S.C. 45(b)), a consent decree was agreed to by ELMO providing in part:

> ". . .this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice."
> (48 F.T.C. 1379, 1387)

The agreement was then submitted to and approved by the Commission (Docket 5959):

> "The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 10th day of June, 1952."
> (ELMO, 48 F.T.C. 1379, 1395)

This order became final under §5(g) of the Act (15 U.S.C. 45(g)) when the appeal period expired on July 10, 1952.

ELMO at all times complied with the said cease and desist order and neither the Commission nor ELMO at any time moved to modify or set it aside. ELMO was not given notice of any proposed change in that decree by the Commission. (App._____)

On June 28, 1963, the Commission, disregarding the existing agreement, told ELMO, (File No. 622-3645), that unless ELMO would sign a new and broader decree, the Commission would issue a second complaint, charging ELMO with fraudulent deception under the Act for advertising in the very manner authorized by the existing consent decree. ELMO conceded the right of the Commission to amend the existing decree upon any showing described in the Commission's Rule V(f) or the statute but denied that the Commission could avoid this preliminary determination and prevent ELMO from having a hearing

thereon by instituting a de novo proceeding, and ELMO formally asked the Commission to conduct its further proceedings under the terms of its own 1952 agreement. On December 27, 1963, the Commission denied ELMO's request and stated that unless it waived its rights under the 1952 decree and accepted a new and broader decree on the same charges, a new complaint against it would be issued, which was done (Docket No. 8615) on February 25, 1964. (App._____)

This refusal of the Commission to abide by the Act and by its own Rules and by its own formal agreement, and by their issuance of a second complaint in the same matter without making the required preliminary showing of a change of law or fact or public policy when in fact it knew plaintiffs had been twelve years in compliance with the terms which it had itself fixed, has substantially prejudiced ELMO in its business and has denied it the right to be heard. If permitted to continue, it would subject ELMO to trial twice upon the same charges for which ELMO has no remedy at law.

STATUTES, REGULATIONS AND RULES INVOLVED

5 U.S.C. §1009

§1009. Judicial review of agency action

Rights of review

(a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, . . .found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ..

15 U.S.C. §45(b), (g)(1)

Proceeding by Commission;
modifying and setting aside orders

(b). . .After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify,

or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Finality of order

(g) An order of the Commission to cease and desist shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b);. . ..

28 U.S.C. §§1361, 1651, 2201 and 2202

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, §1(a), Oct. 5, 1962, 76 Stat.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646. 62 Stat. 944, amended May 24, 1949, c. 139, §90, 63 Stat. 102.

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, §1212 (p), 72 Stat. 349.

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

Federal Trade Commission, Rules of Practice for Adjudicative Proceedings,

Subpart H. 16 C.F.R. Sec. 3.28(b)(1)

Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a complaint, should be altered, modified or set aside in whole or in part, the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary.

Federal Trade Commission, Rules of Practice, Rule V, Para.

(f) effective Aug. 4, 1951

V.

Complaints, defaults, consent settlements.

. . . . .

(f). Pursuant to a change of law or facts, or when the public interest so requires, a consent settlement may be altered, modified, or set aside in whole or in part upon consent of all parties. All consent settlements shall contain an agreement that if consent to a change desired is not obtained, the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint, undertake corrective action as to any acts or practices not prohibited by any remaining provisions of the consent settlement.

STATEMENT OF POINTS

1. Cease and desist orders which have become final under §5(g) of the Act are binding on the Commission as well as the parties. Therefore, whether or not the statute required a particular form of reopening procedure, the Commission was obliged to honor its own agreement with ELMO.

2. Any modification of such a final decree is required by §5(g) to be reopened in accordance with the procedure there set forth, i.e.

the last sentence of §5(b), and the Commission was not given the power to avoid this preliminary showing by instituting a de novo action.

3. Deprivation of the statutory hearing is a substantial and irreparable injury to ELMO where a continuation of the second trial would moot its bargained right to a threshhold review of any proposed change.

4. Clearly the Court below had jurisdiction under the Declaratory Judgments Act and Administrative Procedure Act to review the action of the Commission in denying appellants their agreed hearing.

ARGUMENT

I.

Conclusiveness of Federal Trade Commission Cease and Desist Orders

It is the position of appellants that after the cease and desist order became final under 15 U.S.C. §45(g)(1) in 1952, it was just as binding on the Federal Trade Commission as it was on the appellants and subject only to change as that statute provided. It is not a case of foreclosing the Commission from making any proper change in the public interest. To the contrary, appellants concede the right of the Commission to do so if they abide by their own agreed procedures to do it. To allow them to avoid that obligation is to deny appellants without just cause the benefit of the bargain they made

with the government, which, in turn, was the consideration for their accepting the decree in 1952.

As a matter of precedent, the Commission has been held to be bound by its own prior orders. As stated by the Seventh Circuit in United States v. Willard Tablet Co., 141 F. 2d 141 (1944) [152 ALR 194]:

> "The government's second contention seems to rest solely upon the provisions of the Federal Trade Commission Act, as amended, 15 US CA §45(b)(g), that the Commission may, under certain conditions, modify its order after the expiration of time for appeal. Therefore, the contention is that such power of modification leaves an unappealed order without that finality essential to invoke the doctrine of res judicata. With this contention we do not agree.
>
> "The Act provides that an order of the Commission shall become final at the expiration of sixty days if no appeal is taken (45(g)), and further provides for heavy penalties for violation of such order (45(l)). It further provides that 'the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.' Subd. (c). Thus, even the reviewing court in the same proceedings is bound by the findings of the Commission. To allow their finality to be attacked in a collateral proceeding would seem to run counter to the provisions and purposes of the Act. As was said in the case of United States v. Piuma, D. C., 40 F. Supp. 119, 122:
>
> > 'Is it the province of the court to try the truth or falsity of the defendant's advertisements already found to be false by the Commission? The answer to this question depends upon the meaning to be given the word 'final' as used in subsection (g). The purpose of the provision was to bring the doctrine of res judicata into the Federal Trade Commission's jurisprudence.'

In United States v. 1 Dozen Bottles etc., 146 F. 2d 361 (C.A. 4, 1944), it was noted that the findings of the Commission were res judicata not merely as to the Commission but as to the Government as a whole and would

therefore prevent the institution of a condemnation action under the Federal Food, Drug and Cosmetic Act by the Department of Justice. A fortiori, such findings would prevent a relitigation in the same agency.

As stated in George H. Lee Co. v. F.T.C., 113 F. 2d 583, 585-6 (C.A. 8, 1940):

> "Although the remedies sought by the government in the two proceedings were different--condemnation in the first, and a cease and desist order in the second, --it is obvious that the alleged falsity of the representations of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings, that in the libel proceeding the court determined that the representations that the product was a remedy for tapeworms and pinworms as well as large and roundworms were not false, while the Commission later determined that the representations with respect to pinworms and large tapeworms were false and misleading. It is equally obvious that the Commission completely disregarded the effect of the decree entered in the libel case in conducting its proceedings and in making its findings of fact, conclusions of law, and order.
>
> "Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit. Sunshine Anthracite Coal Co. v. Adkins, 60 S. Ct. 907, 916, 84 L. Ed. 1263. 'There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between the party and another officer of the government.
>
> "The United States may not relitigate the same issue in successive libel proceedings involving different qualities of the same product (George H. Lee Co. v. United States, 9 Cir., 41 F. 2d 460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same.
>
> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court

or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties."

In American Chain & Cable Co. v. Federal Trade Commission, 142 F. 2d 909, 913 (4th Cir., 1944), the Court said:

"It is more consonant with the intention of Congress, we think, to hold that modification of enforcement decrees should be made only after the Commission has taken action under the provision of the statute above quoted [45(b)] and that in the meantime, the power of the Court with respect to modification is limited ordinarily to require action on its part. Any action taken by the Commission would then be subject to review by the Court, as in the case of other orders, and any modification of the original orders, whether reviewed or not, would serve as a basis for the modification by the Court of its original decree."

And in Mohr v. Federal Trade Commission, 272 F. 2d 401 (9th Cir., 1959), it was confirmed judicially that a Commission order reopening a prior order under the statute upon the ground that public interest or a change in law or fact had been shown, was reviewable.

II.

Jurisdiction of the District Court

In the complaint, appellants asked injunctive and declaratory relief under 28 U.S.C. §1361, against the Commission individually for excess of authority:

"To compel an officer. . .of the United States or any agency thereof to perform a duty owed to the plaintiff."

and alternatively under the review provisions of the Administrative Procedure Act (5 U.S.C. § 1009) against the Federal Trade Commission itself.

The general principle on which appellants rely is that stated by the District Court for the District of Columbia in American President Lines, Inc. v. Mackey; 120 F. Supp. 987 (1953), where it was held:

> "The substantive right to secure a judicial review of agency action is conferred by the Administrative Procedure Act, U.S.C.A., Title 5, Section 1009(a). The form of action to secure such a review is also regulated by the Administrative Procedure Act, Section 1009(b). It is provided that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter,or in the absence or in the inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments. Accordingly, an action for a declaratory judgment is a proper remedy to secure a review of agency action. The complaint in such an action must, however, set forth an actual controversy.

That the Act specifically grants jurisdiction to district courts to review oppressive forms of agency action, see Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F. 2d 794 (5th Cir.; 1960). Mr. Justice Reed sitting in this Court similarly held, in Brandenfels v. Day, 114 App. D.C. 374, 316 F. 2d 375 (1963) cert. den. 375 U.S. 824 (1963):

> "Section 6 of the Administrative Procedure Act provides that '/e/very agency shall proceed with reasonable dispatch to conclude any matter presented to it * * * ' and section 10(e) provides that a reviewing court shall 'compel agency action unlawfully withheld or unreasonably delayed.' In Deering Milliken, Inc. v. Johnston, 295 F. 2d 856, 863 (C.A. 4, 1961), the Fourth Circuit recognized that these provisions give 'rise to legally enforceable rights of the parties to the proceeding' and upheld, with modifications, a district court order prohibiting further hearings before a trial examiner upon a second remand to the examiner by the National Labor Relations Board. The court thus compelled the Board to reach a decision on the basis of the record already compiled by the hearing examiner."

The Court went on to say that the parties would be bound by any agreement which terminated the administrative proceeding:

> ". . . the appellant had previously given his consent to this disposition in the event the Judicial Officer rejected his contentions on the merits, appellant may not complain now that the procedure has

been carried out. He is, in effect, bound by his prior agreement. Cf. United States Bio-Genics Corp. v. Christenberry, 173 F. Supp. 645, 649 (S.D.N.Y.), aff'd. 278 F. 2d 561 (C.A. 2, 1959); Democrat Printing Co. v. F.C.C., 91 U.S. App. D.C. 72, 202 F. 2d 298, 305 (1952). Had the appellant not entered that agreement, it is possible that the Post Office would have adopted one of the other alternative procedures open to it. Having pursued a course then acceptable to the appellant,the Post Office cannot now be required to consider the matter still another time.

"Because of appellant's consent to the procedure followed by the Judicial Officer, we will neither compel the Post Office to proceed further nor enjoin it from ever again instituting proceedings against appellant arising out of related matters."

If such force is given to an informal agreement, a fortiori the parties would be bound by the formal entry of a decree on consent.

In St. Regis Paper Company v. United States, 368 U.S. 208 (1962), Justice Clark dismissed an appeal from the assessment of forfeitures for non-compliance with Federal Trade Commission orders because the petitioner had failed to protect itself by testing the validity of the order under the Declaratory Judgments Act and Administrative Procedure Act before the long continuation of further administrative and judicial proceedings,

"There the record did not present and the Court did not determine 'whether the Declaratory Judgments Act, 28 U.S.C.A. Secs. 2201, 2202, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order.' Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had 'no chance' to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. United States v. L.A. Tucker Truck Lines, 34 U.S. 33, 37, 73 S. Ct. 67, 69, 97 L.Ed. 54 (1952); Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300, 310, 58 S. Ct. 199, 204, 82 L.Ed. 276 (1937). We note, however, that the Declaratory Judgments Act, 28 U.S.C. Sec. 2201, 28 U.S.C.A. Sec. 2201, provides that 'In a case of actual controversy within its jurisdiction * * * any court * * * may declare the rights * * * of any interested party seeking such declaration * * *.' This appears sufficient to meet petitioner's needs."

In Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (4th Cir., 1961), the Court noted that the late Senator McCarran, the author of the bill which is now known as the Administrative Procedure Act, had stated that it

". . . conferred no administrative powers, but provided definitions of, and limitations upon, administrative action, to be interpreted and applied by the agencies in the first instance, but to be enforced by the courts in the final analysis. . . /and/ that it was the intention of the bill /which became the Act/ in the absence of any other adequate, available remedy, to give a party injured by a violation of one of the terms of the bill, the right of enforcement by the extraordinary remedies of injunction, prohibition and quo warranto."

On the authority of Deering Milliken, the District Court, in Texaco, Inc. v. Federal Trade Commission, ___ F. Supp. _____ (D.D.C., 1961 (1962 Trade Cases,Para. 70, 382)), specifically held that it had mandamus jurisdiction over the manner in which the Federal Trade Commission conducted its proceedings:

"The plaintiffs are entitled to declaratory and injunctive relief under Section 10(e) of the Administrative Procedure Act for failure of the Commission to proceed with reasonable dispatch to conclude the Proceeding."

A similar holding was made in J. Weingarten, Inc. v. Federal Communications Commission, ___ F.Supp. _____ (S.D. Tex. 1963) (1963 Trade Cases, Para. 70, 790), noting that district courts were given express authority to grant declaratory and injunctive relief against the Federal Trade Commission under Sec. 6(a) and 10 of the Administrative Procedure Act and the 1962 amendment to the Judicial Code conferring general mandamus authority on United States courts over all public officials (28 U.S.C. Sec. 1361).

And in B. F. Goodrich Co. v. Federal Trade Comm., 208 F. 2d 829 (D.C Cir. 1953), this Circuit reversed a holding that the District Court lacked injunctive jurisdiction over Federal Trade Commission proceedings. The test there set by this Court was solely that of the damage to plaintiff.

Most recent of the cases in point in this Circuit is the ruling of Judge McGarraghy in Graber Mfg. Co., Inc. v. Dixon, _____ F. Supp. ____ (D.D.C. 1963) (1963 Trade Cases, Para. 70, 933) holding that the Administrative Procedure Act gave the district court jurisdiction to compel the Federal Trade

Commission to maintain the confidentiality of the business files of a respondent and that a refusal to so order during the proceeding was an abuse of discretion.

III.

Irreparable Injury

1. Appellants are a small business. They can scarcely affort to endlessly relitigate the same causes. If the Commission can start a second action, then it can start a third or any number. Apart from cost, the loss of earnings caused by being publicly accused of making false claims is relatively great. Nothing in the official press release tells the public that the statements now complained of were formerly approved by an order of the Commission. It is hornbook law that the courts will grant relief in a declaratory judgment action against unfair dissemination of statements by government agencies that individuals are in violation of law. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, (1951); B. C. Morton Int'l. Corp. v. Federal Deposit Ins. Corp., 305 F. 2d 692 (C.A. 1, 1962); Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, (1959). And see Coal Sales v. Mitchell, 164 F. Supp. 161 (D. D. C., 1958), affirmed sub nom. George v. Mitchell, 108 U.S. App. D. C. 324, 282 F. 2d 486 (1960), which specifically enjoined agency action which would have placed the plaintiffs on a "black list".

2. The right to a hearing is a substantive right. The right to have the matter considered by the Federal Trade Commission and thereafter by this Court on the whole record in the light of the prior proceedings is clearly a problem of administrative due process as well as a statutory right; George H. Lee, Co. v. Federal Trade Commission, supra; U.S. v. Willard

Tablet Co., supra. To deprive appellants now of the right to the threshhold protection provided by Congress is not only to deprive it of its right to a day in Court, but destroys unilaterally the consideration for its original consent to the 1952 order.

3. In Embassy Dairy v. Camalier, 93 U.S. App. D.C. 364, 211 F. 2d 41 (1954), this Court held that the granting of an injunction against oppressive agency action depended upon:

> ". . .the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally."

The complaint in the District Court sought to maintain the status quo, not to change it. The status quo in question was fixed by the Commission itself twleve years ago. Nothing in the second agency complaint suggests any change of facts or law or other circumstances requiring emergency action in the public interest.

That the District Court erred in holding that it lacked jurisdiction to compel the Commission to proceed against appellants solely pursuant to the procedure required by 15 U.S.C. §45(b), the Commission's own regulations, and its own prior cease and desist order, seems apparent from the virtual concession in appellees' brief in the lower Court that the two Commission proceedings are the same. At most the argument is made that the Commission has discretion to deprive appellants of either hearing or review. We say it has not.

That is the substantive issue in this case.

Conclusion

1. The judgment should be reversed and the case should be remanded to the District Court to require the Commission to show cause why it should be required to follow the reopening procedure provided in 15 U.S.C. 45(b) in modifying the existing ELMO decree.

2. Interlocutory relief should be granted to prevent undue hardship to appellants if the matter is to be returned to the District Court.

Respectfully submitted,

STEADMAN, LEONARD & HENNESSEY

Attorneys for Appellants

By _____

May 22, 1964

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the attached Brief for Appellants on David C. Acheson, Attorney for Appellees, United States Attorney, Washington 25, D. C., by mailing him a copy, postage prepaid, on May 22, 1964.

Geo. Stephen Leonard

Attorney for Appellants

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4/7/64	Reply memorandum by plaintiffs in support of motion for preliminary injunction
4/16/64	Proposed order by plaintiffs dismissing complaint
4/16/64	Order Dismissing Complaint sua sponte and dismissing motion for preliminary injunction as moot; staying Administrative Proceedings of FTC incident to Docket No. 8615 to 4/18/64 (signed 4/15/64 Jones, J.
4/16/64	Notice of Appeal by plaintiffs from Judgment of 4/15/64
4/16/64	Request of plaintiffs to transmit original record to US CA pursuant to Rule 12(h) US CA

In the
UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

The ELMO DIVISION of DRIVE-X COMPANY, INC., CRAIG SANDAHL, and RICHARD JOHANN; Madrid, Iowa; Plaintiffs,	
vs.	CIVIL ACTION No. 572-64
PAUL RAND DIXON, SIGURD ANDERSON, PHILIP ELMAN, A. EVERETTE MacINTYRE, JOHN R. REILLY and The FEDERAL TRADE COMMISSION; Washington 25, D. C. Defendants.	

COMPLAINT
FOR DECLARATORY RELIEF

1. The individual plaintiffs are officers of the corporate plaintiff, an Iowa corporation, which, with its corporate predecessor, the Elmo Company, Inc., is hereinafter referred to as ELMO. The individual defendants are the Chairman and Commissioners of the Federal Trade Commission and are named herein in their official capacity upon a cause of action arising under 28 U.S.C. §1361, 15 U.S.C. §45 and regulations promulgated thereunder as hereinafter more fully appears. The Commission is named as defendant upon a cause of action for the review of arbitrary administrative action under §10 of the Administrative Procedure Act, (5 U.S.C. §1009). Defendants are hereinafter collectively referred to as the Commission. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. ELMO, at all relevant times, advertised and sold proprietary medicines. On June 10, 1952, after the Commission complained of certain features of ELMO's advertising, a consent decree was agreed to by ELMO providing in part:

> ". . .this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice."
>
> (48 F.T.C. 1379, 1387)

3. Paragraph (f) of Rule V of the Commission's Rules of Practice in effect on the date of the agreement is annexed hereto as Exhibit A. It provides in part:

> ". . .the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings, . . ."

4. The agreement was then submitted to and approved by the Commission. (Docket 5959).

> "The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 10th day of June, 1952."
>
> (ELMO, 48 F.T.C. 1379, 1395)

5. ELMO has at all times complied on its part with the said cease and desist order. Neither the Commission nor ELMO has at

any time moved to modify or set aside that consent settlement of June 10, 1952; nor has ELMO been given notice of or any opportunity to be heard on any proposed change of the said decree or of any finding that the public interest so requires.

6. On June 28, 1963, the Commission, in disregard of the existing agreement, advised ELMO that it proposed to issue a new complaint, (File No. 622-3645) against ELMO substantially identical to that issued in 1952 and to reopen the proceedings without compliance with its own regulations as theretofore agreed.

7. Upon receiving such notice, ELMO, while conceding the right of the Commission to amend the existing decree upon the agreed showing as called for in Rule V(f), denied that the Commission could avoid the preliminary determination required by its own Rules or deny ELMO a hearing thereon by instituting a new proceeding. ELMO then requested the Commission to limit its further proceedings in the matter to the terms of its 1952 agreement.

8. On December 27, 1963, ELMO was advised that the Commission had denied its request and that unless it waived its rights under the 1952 decree and accepted a new and broader decree on the same charges, a new complaint against it would be issued, and this was done (Docket No. 8615) on February 25, 1964.

9. By its refusal to abide by its own Rules and formal agreement and published Order, by the issuance of a second complaint

in the same matter without making the required showing of change of law or fact, by accusing plaintiffs of violating the Federal Trade Commission Act in a public press release when in fact it knew plaintiffs had been twelve years in full compliance with the terms which it had itself fixed under that statute, the Commission, without any justification therefor has substantially prejudiced ELMO in its business and reputation, has denied it the right to be heard, would subject it to trial twice upon the same charges and, if permitted to continue, will constitute a continuing forfeiture of plaintiffs' property causing plaintiffs irreparable injury for which they have no remedy at law.

10. Since no appeal is any longer possible from the original cease and desist order of 1952, since no further application for such relief is available to plaintiffs under the Rules of the Commission, and since no order has been issued by the Commission which is appealable to the United States Court of Appeals under 15 U.S.C. §45(c), plaintiffs have exhausted their administrative remedies and have no specific statutory remedy. Only review of the administrative action by this Court pursuant to the statutes aforesaid can relieve plaintiffs from being denied administrative due process by being twice tried on the same charges, being made subject to two orders on the same facts, being twice unjustly publicized as a law violator and from having its property taken without a hearing.

WHEREFORE, plaintiffs pray a judgment of this Court pursuant to 28 U.S.C. §2201 declarative of the rights of the parties together with a mandatory order of this Court pursuant to 5 U.S.C. §1009(e), 28 U.S.C. §§1751 and 2202, and Rule 81(b)

of the Federal Rules of Civil Procedure requiring defendant to withdraw the new complaint and confine any further efforts to rescind its prior action to the agreed procedures under its Rule V(f).

Plaintiffs further pray a temporary restraining order and preliminary stay of Commission proceedings under the new complaint pending final determination herein.

Respectfully submitted,

STEADMAN, LEONARD & HENNESSEY,
1730 K Street, Washington 6, D. C.

By Geo. Leonard
Geo. Stephen Leonard

Attorneys for Plaintiffs.

March 5, 1964

Rule V, Para (f) effective Aug. 4, 1951

V

Complaints, defaults, consent settlements.

. . . . .

(f). Pursuant to a change of law or facts, or when the public interest so requires, a consent settlement may be altered, modified, or set aside in whole or in part upon consent of all parties. All consent settlements shall contain an agreement that if consent to a change desired is not obtained, the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint, undertake corrective action as to any acts or practices not prohibited by any remaining provisions of the consent settlement.

[CAPTION OMITTED]

ORDER

This cause having come before the Court on plaintiffs' motion for preliminary injunction and it appearing, after consideration of the pleading, the motion, the opposition thereto and the oral argument of counsel, that the Court lacks jurisdiction over the subject matter and that the parties do not oppose sua sponte procedure in dismissing this cause, it is by the Court this 15th day of April, 1964,

ORDERED, sua sponte, that the complaint be and the same hereby is dismissed and it is therefore

FURTHER ORDERED that plaintiffs motion for preliminary injunction be and the same hereby is dismissed as moot, and it is

FURTHER ORDERED that the administrative proceedings of the Federal Trade Commission incident to Docket No. 8615 be and the same hereby are stayed for a period of 10 days to and including April 18, 1964.

s/ W. B. Jones
WILLIAM B. JONES
United States District Judge

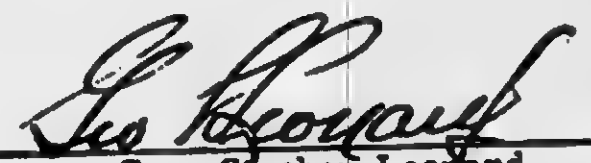
In the
UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

The ELMO DIVISION of DRIVE-X COMPANY, INC., et al., Plaintiffs, vs. PAUL RAND DIXON, the FEDERAL TRADE COMMISSION, et al., Defendants.	Civil Action No. 572-64

NOTICE OF APPEAL

Notice is hereby given that plaintiffs herein hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment of this Court dismissing the complaint herein for lack of jurisdiction, entered in this action on April 15, 1964.

STEADMAN, LEONARD & HENNESSEY

By 
Geo. Stephen Leonard

Attorneys for Plaintiffs
1730 K Street, N. W.
Washington 6, D. C.

April 16, 1964

701

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,559

THE ELMO DIVISION OF DRIVE-X-COMPANY, INC., ET AL.,
APPELLANTS

v.

PAUL RAND DIXON, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER.
SYLVIA A. BACON.
DAVID EPSTEIN.
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellees the following questions are presented on appeal.

1) Whether the District Court had jurisdiction to consider a complaint requesting declaratory relief and an injunction to prevent the Federal Trade Commission from going forward with proceedings against appellants charging them with false advertising, where the statute specifically vests judicial review in the appellate courts and appellants have failed to exhaust their administrative remedies?

2) Assuming the District Court had jurisdiction to consider the complaint, did appellants make a sufficient showing to support their request for the issuance of an injunction preventing the Federal Trade Commission from proceeding against them?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,559

THE ELMO DIVISION OF DRIVE-X-COMPANY, INC., ET AL., APPELLANTS

v.

PAUL RAND DIXON, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE FACTS

By complaint for declaratory relief filed on March 6, 1964, appellants sought an injunction in the District Court to prevent further Federal Trade Commission proceedings against them pursuant to a complaint charging "false advertisements". Appellants maintain that because of a previous consent decree entered into between appellants and the Commission on June 10, 1952, the commencement of new proceedings is barred. The appropriate procedure, appellants suggest, for dealing with these charges is by amending the existing consent decree upon the showing required in Rule V(f), Commission's Rules

of Practice which was in effect in 1952. 16 F.R. 6503, July 4, 1951. In support of their motion for a preliminary injunction appellants alleged irreparable injury, the result of adverse publicity following the filing of the Commission complaint (J.A. 2-6).

On April 8, 1964, the motion for an injunction was argued. (See Record). The Court found that it lacked jurisdiction over the subject matter and ordered the dismissal of appellants' complaint for declaratory relief. By dismissing the complaint the court further held that the motion for a preliminary injunction was mooted. (J.A. 8.)

Following this action by the District Court, appellants. on April 17, 1964, filed a motion for a stay pending appeal in the form of a motion for a temporary restraining order pending the hearing of the appeal by this Court. By order filed on May 7, 1964, this Court denied appellants' motion. (See Record.) The instant appeal is from the District Court's dismissal of the complaint (J.A. 9).

SUMMARY OF THE ARGUMENT

The District Court properly determined that it did not have jurisdiction over the subject matter of appellants' complaint where appellants sought to halt further Federal Trade Commission proceedings charging false advertisements. The Federal Trade Commission Act specifically vests judicial reviewing powers in the appellate courts, not the district courts. Further, the Administrative Procedure Act is not applicable since appellants have failed to exhaust their administrative remedies before seeking instantaneous recourse to the courts.

Assuming *arguendo* that the court had jurisdiction, appellants still do not meet the required standards for the issuance of an injunction. They fail to show irreparable injury, the likelihood of winning on the merits, or an interest which outweighs the interest of the Commission or the public.

ARGUMENT

I. The District Court did not err in determining that it had no jurisdiction over the subject matter of the complaint.

The District Court correctly determined "that the Court lacks jurisdiction over the subject matter" of appellants' complaint and properly ordered the dismissal of the complaint for declaratory relief and the motion for a preliminary injunction. Appellants sought relief from the court to prevent appellees from continuing proceedings against them. Appellants contended that the new complaint, filed by the Federal Trade Commission and charging false advertisements, was improper because a consent decree, entered between the two parties in 1952, was still in effect, and the Commission was bound to follow the rules for modifying the consent decree [Rule V(f) of the Commission's Rules, 16 F.R. July 4, 1951] rather than institute new proceedings. The power of the District Court to interfere with Commission proceedings is at issue.

By clear and precise statutory language the Federal Trade Act, 38 Stat. 719, 15 U.S.C.A. 45(d), established jurisdiction for judicial review. Review is vested exclusively in the Courts of Appeal; no mention is made of judicial review vesting elsewhere. In *Miles Laboratories* v. *Federal Trade Commission*, 78 U.S. App. D.C. 326, 140 F.2d 683 (1944), *cert. denied*, 322 U.S. 752, this Court, in a case where plaintiff sought relief in the District Court on the grounds that the Commission had exceeded its power and that a public hearing would result in irreparable injury, stated, "it has been held so often as not to require citation of authority, that for a Federal Court to assume the right to suspend the Commission's investigation, while it determines controversial questions of law or fact, would be a clear assumption of power it does not possess." Numerous cases have reached identical conclusions. *E.g. Adams* v. *Federal Trade Commission*, 296 F.2d 861 (8th Cir. 1961); *Mc-*

Fadden Publications, Inc. v. *Federal Trade Commission*, 59 App. D.C. 192, 37 F.2d 822 (1930); *Royal Baking Powder Co.* v. *Federal Trade Commission*, 59 App. D.C. 70, 32 F.2d 966 (1929), *cert. denied*, 280 U.S. 472; *Sears Roebuck* v. *Federal Trade Commission*, 210 F. Supp. 67 (D.C.D.C. 1962); *cf. Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160 (1927).

Nor does the Administrative Procedure Act confer jurisdiction on the District Court to enjoin any further proceedings by the Federal Trade Commission. Under Section 10(c), APA, 60 Stat. 242, 5 U.S.C.A. 1009(c) a final order or action is required before review may be sought. The denial of appellants' request that the Commission proceed by reopening the consent decree of 1952, rather than instituting new proceedings, is a purely preliminary matter. It was incidental to an exploration of settlement possibilities, and the matter can again arise at later stages of the proceedings. Since the decision of appellees not to proceed by reopening the 1952 consent decree is just a preliminary step in a procedure which includes complaint, hearings, written reports, cease and desist orders, and petitions for review, appellants have not exhausted their administrative remedies, a prerequisite to any review in the courts. Because the suit is premature, the District Court is without jurisdiction to hear the complaints. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Allen* v. *Grand Central Aircraft Corp.*, 347 U.S. 535 (1954); *Aircraft and Diesel Equipment Corp.* v. *Hirsh*, 331 U.S. 752 (1947); *McCauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); see *Brandenfelds* v. *Day*, 114 U.S. App. D.C. 374, 316 F.2d 375 (1963).

Included in the potpourri of appellants' attempt to invoke the jurisdiction of the District Court is 28 U.S.C. § 1361, a statute enacted in 1962. The purpose of that statute is "to make it possible to bring actions against government officials and agencies in the United States district courts outside the District of Columbia, which, of certain existing limitations on jurisdiction and venue,

may now be brought only in the United States District Court for the District of Columbia." S. Rept. No. 1992, Aug. 31, 1962, 87th Cong., 2nd Sess; 1962 U.S. Code Cong. and Adm. News, p. 2784. The statute is thus intended to do two things: 1) grant jurisdiction to district courts to issue orders compelling officials to perform their duties and to make decisions in matters involving the exercise of discretion and 2) to broaden the venue provisions. Appellants fail to explicate the basis of their reliance, in this case, on such a statute and their reference to it is irrelevant.

Also inapplicable are the cases upon which appellants rely. Generally, the cited cases (Br. 17) deal with the power of the courts to intervene where an agency has failed to dispose of a case with reasonable dispatch. See generally, *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961). A situation not here present. Appellants bring themselves under none of the other exceptions to the rules of law set forth above. Unlike *Leedom* v. *Kyne*, 358 U.S. 184 (1958), where the administrative agency was acting in direct violation of a statutory prohibition depriving plaintiffs of rights secured for them by Congress, appellants here are seeking, during the process of the administrative action, an intermediate "excursion into the courts." An oft deplored practice. *Securities and Exchange Commission* v. *R. A. Holman & Co.*, 116 U.S. App. D.C. 279, 282, 323 F.2d 284, 287 (1963). Orderly procedure within the framework of an administrative agency does not allow what appellants' desire—instantaneous recourse to the courts.

II. Appellants do not make an adequate showing to justify the issuance of an injunction.

Even assuming that jurisdiction exists to issue an injunction halting the Federal Trade Commission proceedings against appellants, inadequate grounds for the issuance of such an injunction are present. The issuance of an injunction requires a showing of irreparable injury, likelihood of success on the merits, and an interest which

outweighs the interest of the Commission and the public. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958). Appellants fail to show any of the requisites for the issuance of an injunction. Moreover, by following the procedures within the Commission, appellants have an adequate administrative remedy and can there seek relief. As stated in *Black River Valley Broadcasts* v. *McNinch*, 69 App. D.C. 311, 314, 101 F.2d 235, 238 (1938), *cert. denied*, 307 U.S. 623,

> "In general, where there is an administrative remedy provided by statute, it has been declared to be a plain and adequate and complete relief barring injunctive relief."

Appellants' complaint of adverse publicity and expense incurred in pursuing a remedy does not constitute a sufficient showing for an injunction on the grounds of irreparable injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 47-48, 50-52 (1938); *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 779 (1947).

Further, appellants have an adequate remedy at law. If the administrative proceedings result in an adverse order, appeal may be taken to the Court of Appeals. Section 5(c), Federal Trade Commission Act, 15 U.S.C.A. 45(c).

On the merits appellants show little likelihood of success. They are attempting to curtail the discretion of the Commission to proceed in a particular manner. Contrary to appellants' contentions, the Commission is not bound to proceed only by reopening the 1952 consent decree under Rule V(f) of the Commission's Rules of Practice, *supra*. Nor does any statute or regulation preclude the issuance of a new complaint against appellants. Selection of the method by which to proceed is a matter of agency discretion. See, *Hoving* v. *F.T.C.*, 290 F.2d 803, 807 (2nd Cir. 1961); *ECK Miller Tranfer Co.* v. *United States*, 143 F.Supp. 409 (D. Ky. 1956).

Appellants argue that application of the doctrine of *res judicata* is appropriate under the circumstances of this case. Apparently, if *res judicata* is applicable, appellants can show that they will prevail. *Res judicata*, however, does not ordinarily apply to decisions of administrative tribunals. *Jason* v. *Summerfield*, 94 U.S. App. D.C. 197, 214 F.2d 273 (1954), *cert. denied*, 348 U.S. 840; *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 91 U.S. App. D.C. 395, 402, 202 F.2d 190, 198 (1952), *affirmed on other grounds*, 347 U.S. 239; *Churchill Tab ernacle* v. *Federal Communications Commission*, 81 U.S. App. D.C. 411, 160 F.2d 244, 246 (1947). Even if the doctrine of *res judicata*, particularly illusive when applied to administrative proceedings, were available, it would not apply here. In 1952 a consent decree, not a final adjudicated order, was entered between Elmo Company, Inc. and the Commission. Moreover, the passage of time, twelve years, may have caused changed conditions and a new factual situation. See 48 F.T.C. 1379 (1952). In addition it appears that different parties are involved. The original consent decree was entered with Elmo Company, Inc.; the present Commission complaint is against the Drive-X-Company, Inc., trading as the Elmo Company and against two other defendants. An identity of issues and parties is required before *res judicata* is applicable; they appear not to be present here. See generally, 2 Davis, Admin. Law, Ch. 18, pp. 568-590 (1st Ed. 1958).

In any event appellants seem to seek a distinction without a difference. They concede that the Commission has the right to re-open the consent decree, hold hearings, make new determinations, and conclude that appellants are advertising in a misleading manner (Br. 11-12). The filing of the new complaint by the Commission will afford appellants adequate hearings to explain their views. The procedural safeguards are no less under the manner the Commission has chosen than under the avenue appellants would follow.

An additional consideration for the granting of injunctive relief is the relative weight of the interest of appellants and the public interest. The Federal Trade Commission is determining whether or not appellants are advertising falsely the alleged beneficial effects of their products. If the representations by appellants that their product will cure or constitute an effective treatment for poor hearing or ear and head noises or catarrhal conditions of the head are not true then the public should be so advised immediately.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,559
(C.A. No. 572-64)

THE ELMO DIVISION OF DRIVE-X-COMPANY, INC., ET AL., APPELLANTS

v.

PAUL RAND DIXON, THE FEDERAL TRADE COMMISSION, ET AL., APPELLEES

PETITION FOR REHEARING EN BANC

Preliminary Statement

This is a case of exceptional general importance in respect to the operation of agency-court relations, and the "exclusive" Court of Appeals review jurisdiction established by Congress in the Federal Trade Commission Act and other statutes. The present opinion contravenes well reasoned precedent in the Supreme Court and this Court requiring exhaustion of the statutory system of administrative and exclusive judicial review. It extends the limited boundaries of the exception established in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), despite the strictures of the Supreme Court to the contrary.

Accordingly, we respectfully submit that the significance of the case warrants rehearing *en banc*.

I. Facts

In 1952 the Federal Trade Commission and a corporation alleged to be appellants' predecessor in interest entered into a cease and desist order by way of consent.[1] The order, reported at 48 F.T.C. 1379, had the effect of restricting certain advertising and implicitly authorizing other forms of advertising. This 1952 order contained a statement providing that the Commission might set aside the agreement in whole or in part "in the manner provided in paragraph (f) of Rule V * * *" This rule announced a procedure whereby the Commission, after hearing, "may, if it finds that a change of law or fact, or the public interest so requires" set aside all or part of the consent settlement. Thereafter a new complaint may issue. The rule implements the provision in the Federal Trade Commission Act which provides that the Commission may, after notice and hearing, modify a prior order

> "* * * whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require * * *" (15 U.S.C. 45(b)).

In 1963 the Commission indicated to appellants that it intended to institute a new complaint which, in part, would seek to bar advertising implicitly authorized under the 1952 order. The new complaint was issued in February of 1964, the Commission having refused appellants' request to conduct a proceeding to modify the 1952 order. The new complaint was the first step in pending proceedings looking to possible entry of a cease-and-desist order. Under the F.T.C. Statute, if such a cease-and-desist order ensues, *exclusive* statutory jurisdiction lies in an appropriate Court of Appeals to review that order and all interlocutory steps taken in the F.T.C. proceedings,

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[1] The old order was entered against "The Elmo Company, Inc., a corporation, its officers, representatives, agents and employees" (48 F.T.C. at 1393) and was signed by "P.E. Coffee" as President of the corporation. The present appellants are the Elmo Division of Drive-X-Company, Inc., Craig Sandahl, and Richard Johann.

and to declare such order void if entered in violation of appellants' rights (15 U.S.C. 45(c)(d)).

Subsequently, without exhausting available administrative and statutory judicial review remedies, appellants filed a complaint in the District Court seeking a declaratory judgment and mandatory relief directing the Commission to withdraw the new complaint and instead conduct a modification proceeding. Appellants claimed "irreparable injury" on the ground of prejudice to their business and reputation through issuance of a press release which accused appellants of violating the law; by denying appellants the right to be heard on the issue of reopening the 1952 order; and by thus subjecting them "to trial twice upon the same charges." They also claimed that the acts of the Commission, if permitted to continue, would constitute "a continuing forfeiture" of property. This complaint was dismissed by the District Court (Jones, J.) for lack of jurisdiction over the subject matter.

II. Opinion of the Panel

A panel of this Court reversed the District Court by a vote of 2-1. In a per curiam opinion, the majority (Judges Prettyman and Burger) held that the District Court had jurisdiction to enjoin the Commission from conducting new complaint proceedings if it should appear to the Court that 1.) The conduct sought to be reached by the new complaint was the same as that involved in the old order, and 2.) there had been no meaningful change in the nature of the parties, as between the 1952 respondents and the present appellants. The majority reasoned that both the incorporation of Rule V(f) into the old order and the provisions of 15 U.S.C. 45(b), gave to appellants the "right" to a re-opening procedure. The new complaint proceedings, in the view of the majority, effectively denied appellants' right to have the F.T.C. determine whether change of fact or law or the public interest warranted reopening. Finally, the majority con-

cluded that equitable relief in the District Court was the "only effective remedy" for violation of the right to such preliminary determinations. The Court reasoned that since appellants conceded the "reliability" of the new complaint procedure, a Court of Appeals reviewing a final order arising out of such new complaint could afford no meaningful remedy in respect of the asserted right to preliminary determinations. Judge Fahy dissented, concluding that the case involved at most a procedural error and that the appropriate forum for judicial review under the "exclusive" statutory scheme was the Court of Appeals, after entry of a final order by the agency.

III. Argument

For purposes of this petition, we assume *arguendo* (with the majority) that the Commission erred in not proceeding by way of re-opening rather than by a new complaint procedure. The question then remains whether this procedural irregularity constitutes such "very unusual and limited circumstances" [2] as would warrant the District Court to intervene in the exercise of its general equity jurisdiction to restrain administrative proceedings from being carried to conclusion and then reviewed under the "exclusive" statutory procedure in the appropriate Court of Appeals.

It is well settled that ordinarily a person aggrieved by a Federal Trade Commission proceeding may obtain review only after issuance of a final order and then only in the appropriate Court of Appeals. 15 U.S.C. 45(c) (d); *Miles Laboratories* v. *F.T.C.*, 78 U.S. App. D.C. 326, 140 F.2d 683 (1944), *cert. denied*, 322 U.S. 752. As this Court said in *Miles Laboratories*, *supra* at p. 328:

> "* * * for a Federal Court to assume the right to suspend the Commission's investigation, while it de-

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[2] *Wolf Corporation* v. *S.E.C.*, 115 U.S. App. D.C. 75, 79, 317 F.2d 139 (1963); *S.E.C.* v. *R.A. Holman & Co.*, 116 U.S. App. D.C. 279, 282, 323 F.2d 284 (1963), *cert. denied*, 375 U.S. 493.

> terminates controversial issues of law or fact, would be a clear assumption of power it does not possess. The administrative remedy which Congress has provided must be first exhausted."

This rule requiring exhaustion of administrative remedies has long been, and remains a cardinal principle of administrative law. *United States* v. *Sing Tuck*, 194 U.S. 161, 167-170 (1904) (opinion by Mr. Justice Holmes); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). The same proposition applies in respect of the exhaustion of an agency's "primary jurisdiction", followed by "exclusive" review in accordance with the statutory scheme. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965).

In the instant case, the Federal Trade Commission proceedings are at an interlocutory stage, and there has been no final order at all. The Commission has not yet considered the case.[3] Appellants will have full opportunity in the course of the pending proceedings to persuade the Commission that the 1952 advertising should be permitted to stand. "When that is done, it is possible that nothing will be left of appellant's claim * * * concerning which it will have basis for complaint." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947) (rejecting effort to short-cut the administrative process by resort to court).

Hence, the decision of the panel upholds District Court jurisdiction contrary to the settled principle that review must await the normal completion of administrative proceedings and entry of a final adverse order.

The majority of the panel sustained District Court jurisdiction on the theory that if the pending Federal Trade Commission proceeding were allowed to proceed to conclusion, appellants would be left with no effective remedy for violation of their assumed right to have the re-open-

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[3] We are informed that the Hearing Examiner, prior to the division opinion, had rendered a decision adverse to appellants. Further action has been suspended pending the result of the instant suit.

ing determinations made first. This conclusion does not follow. Effective remedy is available without the creation of extraordinary, time-consumming interlocutory district court review.

Apart from the possibility that appellants may well prevail before the Commission, the new complaint proceeding will itself necessarily encompass a determination as to one of the alternative re-opening criteria—the requirement of "public interest." As noted, the re-opening procedure which appellants were denied would have entitled them to one of two alternative findings: either that "a change of law or fact" *or* "the public interest" required modification of the 1952 order. Under the new complaint the Commission must also establish that its proceeding is in "the interest of the public" 15 U.S.C. 45 (b); *F.T.C.* v. *Raladam Co.*, 283 U.S. 643 (1931). Since appellants will defend against the new complaint on the basis of the 1952 consent order, final adverse action in the new proceeding will necessarily include a determination that the "public interest" required modification of that old agreement. The final order is of course reviewable in this Court, where the "public interest" determination can be fully litigated. *F.T.C.* v. *Klesner*, 280 U.S. 19 (1929); *Exposition Press, Inc.*, v. *F.T.C.*, 295 F.2d 869 (C.A. 2, 1961), *cert. denied*, 370 U.S. 917. If upon review of the final order it is determined that the "public interest" finding is unsupported, then the Commission's order is reversed. *Klesner, supra.*[4]

If the Commission should issue an order without considering the defense based on the 1952 agreement, then this Court could simply remand the case. See *e.g. Wheeler* v. *N.L.R.B.* 114 U.S. App. D.C. 255, 314 F.2d 260 (1963); *Fashion Originators Guild* v. *F.T.C.*, 114 F.2d

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[4] As a practical matter the new proceeding will also likely involve a determination as to "change of law or fact." But in any event, the "change" is no more than an alternative basis for re-opening an old order. So long as the "public interest" requirement is litigated and reviewed, appellants can have no real complaint; they are entitled to but one of the two alternative findings.

80, 82-83 (1940) (L. Hand, J.), *aff'd*, 312 U.S. 457 (1941). In either event the existing administrative and judicial system provides appellants with an adequate remedy for violation of the assumed right to a re-opening determination.

The majority also reasoned that appellants had no effective remedy as to the denial of the re-opening procedure because they concede the "reliability" of the new complaint procedure (S.O. p. 11). Insofar as the majority may mean that the failure to conduct a re-opening proceeding might ultimately be regarded as "harmless error", this factor militates against the jurisdictional holding of the Court. For if the procedural error may turn out to be of such little significance as to be harmless, then there is even less reason for an equity court to interfere with the administrative proceedings at a preliminary stage, and thus prevent the statutory scheme for "exclusive" review in the Court of Appeals from being properly effectuated. That the event of "harmless error" by an agency is no ground for equitable intervention is made clear by the decision of this Court in *Wolf Corporation, supra*, where it was said:

> "* * * such relief is to be very sparingly applied and is limited to cases where on its face the contemplated hearing or other administrative process, if consummated, *would be set aside* on review on procedural grounds." (115 U.S. App. D.C. at 79) (emphasis added)

Further, there is in this case no "irreparable injury" such as to warrant an exception to the exhaustion rule or confer "exclusive" review jurisdiction upon the District Court.[5] Indeed appellants have sustained less of an in-

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[5] An allegation of "irreparable injury" is a mere legal conclusion and is not admitted for purposes of a motion to dismiss for lack of jurisdiction. Such a claim must be tested by the factual basis alleged in the complaint. *Electric Bond & Share Co.* v. *S.E.C.*, 92 F.2d 580 (C.A. 2, 1937), *affirmed*, 303 U.S. 419 (1938). See also *Newport News Co.* v. *Schauffler*, 303 U.S. 54 (1938) (allegation as to doing business in interstate commerce is conclusory and not admitted on motion). (See Slip Opinion, p. 2.)

jury than the normal plaintiff who is required to exhaust the existing system. These appellants do not seek complete exemption from the administrative process; rather it is their position that they are entitled to a particular form of preliminary administrative process. It has been repeatedly held that the ordinary burdens of the administrative process and ultimate review do not constitute such "irreparable injury" as will support invocation of the general equity jurisdiction of the District Court. *Myers, supra; Aircraft & Diesel, supra; Petroleum Exploration Inc.* v. *Public Service Commission*, 304 U.S. 209 (1938); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954). *A fortiori*, the same burdens cannot amount to such "irreparable injury" when applied to these appellants who admit that they are subject to regulation, but dispute only a procedural aspect of the agency action.

Appellants have not been denied a hearing on the question of modification of the 1952 order. As stated, the "public interest" aspect of the new proceeding will, on the facts of this case, involve the very question appellants seek to litigate—namely, whether the public interest requires re-opening of the 1952 agreement.

The allegation of damage by publicity is without merit. Similar claims have not excused exhaustion in the past. In any event virtually the same publicity would arise out of an announcement that the Commission was considering re-opening the 1952 order.

Nor is there any substance to the allegation that the new complaint will subject appellants "to trial twice upon the same charges." Even under the re-opening proceeding which they demand, there will be in essence a "trial" as to the propriety of the advertising previously authorized under the 1952 agreement. Moreover, it is settled that even a claim of "res judicata" is no basis for equitable intervention in administrative proceedings. *S.E.C.* v. *Otis & Co.* 338 U.S. 843 (1949) (reversing per curiam the decision of this Court in 85 U.S. App. D.C. 122, 176 F.2d 34).

Finally, the decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), relied upon by the majority (S.O. pp. 5, 6, 7, 9) provides no support for the result reached.[6] In that case the Labor Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." In the instant case there is no specific statutory prohibition against the institution of new complaint proceedings. Moreover the "right" denied in *Kyne* was a substantive right relating to union membership. The "right" assumed to exist in the case at bar involves, at most, the form of preliminary agency procedure. Generally administrative orders which are "merely preliminary or procedural" are not directly reviewable. *F.P.C.* v. *Edison Co.*, 304 U.S. 375, 385 (1938); *Levers* v. *Anderson*, 326 U.S. 219, 222-223 (1945).

Moreover, in *Kyne* the plaintiff union had no other means of obtaining judicial review in the courts. Labor Board certification proceedings are normally reviewable only when and if the employer subsequently refuses to bargain. Thus there were in that case simply no existing administrative or judicial procedures by which the union could effectuate its statutory right.

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[6] The majority also relied upon *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919) and *B. F. Goodrich Co.* v. *F.T.C.*, 93 U.S. App. D.C. 50, 208 F.2d 829 (1953), appeal after remand, 100 U.S. App. D.C. 58, 242 F.2d 31 (1957). Neither decision is in point. In *Skinner & Eddy* the Court treated the subject matter of the suit as beyond the statutory "primary jurisdiction" of the agency. Here the subject matter of the suit is unquestionably within the F.T.C.'s statutory jurisdiction initially to determine. Moreover, *Skinner & Eddy* arose under the Urgent Deficiencies Act of 1913 (38 Stat. 219-221) and thus involved a prior judicial finding, apparently not disputed before the Supreme Court, as to "irreparable injury." *Skinner & Eddy*, as Judge Fahy noted in dissent, revolved around an order which was final and binding. In the instant case the order is purely interlocutory; appellants have not been prevented from doing anything and they have not been irreparably injured. *Goodrich* likewise involved the promulgation of a general rule which had immediate adverse economic impact constituting "irreparable injury" as to certain of the plaintiffs who could disobey only at their peril. Obviously there is no such rule or order at bar.

Subsequent decisions of the Supreme Court have made it absolutely clear that *Kyne* is to be given very limited applicability, as noted in the recent decision of this Court in *Local 30, International Union* v. *McCulloch*, No. 18,650, decided March 25, 1965 (S.O. p. 6, Fn 3). In *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 16-17 (1963) the Court carefully pointed out that its decision there was "not to be taken as an enlargement of the exception in *Kyne*." Again in *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481 (1964) the Court again referred to "the painstakingly delineated" boundaries of *Kyne* and further stated that "the Kyne exception is a narrow one, *not to be extended to permit plenary district court review* * * *" (emphasis added). We respectfully submit that insofar as the opinion of the panel rests upon *Kyne*, the decision appears to violate these strictures laid down by the Supreme Court.

IV. Conclusion

The decision of the majority, in our view, represents an erroneous departure from the rule requiring exhaustion of the administrative process, and the "exclusive" statutory judicial review procedure established by Congress. This process constitutes an adequate remedy for vindication of appellants' claims. Appellants have suffered no "irreparable injury" as would warrant invocation of the general equity jurisdiction of the District Court. The decision has general importance beyond this case. It constitutes a precedent which facilitates subsequent improper excursions in the District Courts, without exhaustion of existing statutory administrative and judicial review procedures. The decision erroneously expands the narrow strictures placed by the Supreme Court on the rule of the

Kyne case. For these reasons we respectfully request rehearing *en banc.*

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ JEROME NELSON
JEROME NELSON
Assistant United States Attorney

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

/s/ JEROME NELSON
JEROME NELSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been mailed to attorney for appellants, George Stephen Leonard, Esq., Steadman, Leonard & Hennessey, 1730 K Street, N.W., Washington, D. C., 20006, this 29th day of March, 1965.

/s/ JEROME NELSON
JEROME NELSON
Assistant United States Attorney

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OPPOSITION TO PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18, 559

The ELMO DIVISION OF
DRIVE-X COMPANY, INC., et al.,

Appellants,

v.

PAUL RAND DIXON, the FEDERAL
TRADE COMMISSION, et al.,

Appellees.

Application by Appellees for En Banc Rehearing
of Adverse Determination of this Court
of February 11, 1965

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,559
(C.A. No. 572-64)

THE ELMO DIVISION OF DRIVE-X COMPANY, INC., ET AL.,
Appellants,
v.
PAUL RAND DIXON, THE FEDERAL TRADE COMMISSION, ET AL.,
Appellees.

OPPOSITION TO PETITION FOR REHEARING EN BANC

The Commission's application for a rehearing en banc should be denied. As pointed out by the Supreme Court:

> "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." U.S. v. American-Foreign S.C. Corp., 336 U.S. 685; 80 S. Ct. 1336 (1960).

Such circumstances do not exist in this case. The opinion sought to be reheard merely holds that the District Court has jurisdiction to require the Federal Trade Commission to comply with the terms of its own 1952 decree entered against these appellants, a decree which provides in terms that it could be modified by a specific reopening procedure defined in

the official Regulations of the Commission. Therefore, the ruling which the government seeks to reargue is no more than a direct reaffirmation of a policy of administrative law long established by the precedents of this Court--that agencies will abide by their own orders and proceed according to their own published rules. As pointed out in the challenged opinion (Op. 6), the stipulated facts on the appeal obviated any necessity for going beyond the admitted violation of the agreement and rules of the Commission to determine whether the action of the Commission was additionally a violation of 15 U.S.C. §45(b), defining an identical statutory procedure for reopening decrees which had become "final" under §45(g).

The Issue

Is an order requiring an agency to proceed according to its rules such an extraordinary departure from established doctrine as to require the exceptional procedure of an en banc rehearing? Appellants say, clearly not.

Argument

How then--since the Commission is compelled to concede that in by-passing the agreed reopening procedure it acted in violation of the terms of the applicable rules as well as its prior decree (Pet. 4-5)*--does it argue that such an issue exists?

A. The Government's Argument on the Facts

1. The government first seeks to lay a foundation for its argument that there has been a failure to exhause administrative remedies by recharacterizing in conclusory terms (Pet. 3) the facts stated in the com-

* Mimeographed copy.

plaint, although this Court pointed out on the argument and in its ruling (Op. 2) that these are the only facts of record to be considered on the appeal. Nowhere does the government advert to this Court's holding that the administrative procedure to be exhausted was the procedure which the decree provided and that by avoiding that procedure and filing a second complaint, it was the Commission rather than the appellants who failed to exhaust the statutory and agreed administrative proceedings. One facet of the government's argument on the exhausting of administrative remedies is the reiteration of the statement that the judicial review provided by §45(c) is "exclusive". As even the shortest reference to that statute will indicate, such review is exclusive only as to "cease and desist orders"--not to an order denying the right of appellants to a hearing and review in advance of the reopening of such a decree.

2. Next, the government quotes 15 U.S.C. §45(b) (Pet. 2) but only to a point which omits the Congressional proviso for review in this Court of a Commission order reopening the 1952 decree;

> "Provided, however, That the said person. . . may, within sixty days. . .after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in Subsection (c)."

Inter alia it is the deprivation of this right of review which the Commission now characterizes as "harmless error"[1] (Pet. 9).

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[1]Of course, no "error" was involved. As the complaint shows, before the issuance of the second complaint by the Commission, it specifically denied the request of these appellants to proceed under its Rules and the decree.

Clearly, the evasion of a particular statutory jurisdiction of this Court is neither insubstantial nor harmless error to the person deprived of the thresh-hold protection provided by Congress. Moreover, in the instant case the right to such a procedure was necessarily a part of the consideration for the appellants' acceptance of the Commission's proposed decree in 1952. To allow the Commission to avoid that obligation now is to permit it to unilaterally destroy the basis for appellants' consent.

3. Finally, the government argues (Pet. 7-9) that the issues on a hearing to reopen an existing decree would be nearly the same as those under a new complaint and that, therefore, the judicial review afforded after a second trial of these appellants will include any questions of fact which would be heard under the statute and order which appellants invoke. But clearly this is not so on the face of the record. Even the government is dubious whether the "change of law or fact" could exist as an issue in the second trial (Pet 8, Ftn. 4)[2]. Instead, the petition puts its reliance upon the assumption that a finding of "public interest" in reopening an existing decree would involve the same factual considerations as the "public interest" in filing an initial complaint (Pet. 7). On its face there would appear to be a clear difference between the two. The difference is of importance to the appellants since as the government admits (Pet. 2), the existing order authorizes certain limited advertising which the complaint shows the appellants

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[2]Following the practice set in the footnotes of the petition, we also depart from the record to state that in fact, as the government must know, the appellants were forbidden by the Commission from raising these issues on a second trial.

have used since 1952. In the 1952 decree, the Commission found that the public interest was that this advertising be allowed. Necessarily, therefore, the 'public interest' asserted in 1952 is not the 'public interest' asserted in 1963 and under the statute the Commission must show some reasonable basis for the change.

Accordingly, none of the three statutory issues under the last sentence of §45(b) are the same as the issues set down by Congress for new proceedings in the first sentence of §45(b). Moreover, it seems to us that the government actually concedes this point (Pet. 8) in agreeing that if the defenses under the 1952 decree are not considered (Cf. Ftn. 2, supra), this Court would, after a second trial, send the matter back for a third trial and thereby correct only in the future what this Court's present ruling has already corrected.

We submit that the Commission totally fails to show any substantial error in the factual analysis in the decision with which they disagree.

B. The Commission's Cases

1. Appellants will not here repeat as the petition does, the cases and arguments in the briefs on appeal. Reference is respectfully made thereto to the extent the Court may decide to pursue the legal questions beyond the present opinion. The petition cites no authorities discussing the procedure for reopening an existing Federal Trade Commission decree. It makes no reference to the reopening cases cited in Point I of the argument in appellants' brief on appeal, cases which hold that such decrees are final and binding upon the

Commission, that the reopening procedure provided by Congress must be observed and that judicial review of such a reopening order is provided by the statute.

2. Instead, petitioners largely repeat that portion of their brief on appeal which cites authorities on the principle of the exhaustion of administrative remedies. We have pointed out above that the administrative procedure to be exhausted was the procedure provided by the statute and rules and that it is therefore the Commission rather than the appellants who are failing to utilize the applicable remedy. As to the citation of Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) and similar cases, this Court has already (Op. 4) noted that in the present situation appellants seek no pre-determination on the merits, they seek no review of any substantive decision of the Commission nor do they question the jurisdiction of the Commission to reopen the 1952 decree upon a showing of the statutory grounds. Miles Laboratories v. FTC, 78 U.S. App. D.C. 326, 140 F. 2d 683 (1944) cert. den. 322 U.S. 752, repeats the unquestioned principle that the Federal courts will not attempt to predetermine the merits of a controversy before the Commission where the proceedings were correct and properly instituted. The quotation in the petition (Pet. 9) from Wolf Corp. v. SEC, 115 U.S. App. D.C. 75, 79, 317 F. 2d 139 (1963) entirely supports appellants' position here since it holds that the Court will exercise its authority in

> ". . .cases where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds." (Emphasis added)

We suggest that this is precisely what the present ruling of this Court holds and is in accordance both with the facts as stated in the complaint in this case and the prior authority in this Circuit. Accordingly, the question of exhausting available administrative remedies does not arise on the facts of this case or, to the extent that it does, it is the Commission rather than the appellants who have failed in this obligation.

3. The petition then argues an absence of "irreparable injury" (Pet. 9). There are two clear answers. The government states correctly the cost of compliance with administrative procedures is damnum absque injuria and therefore as a logical deduction from its prior argument, appellants cannot show injury from the cost of a second trial. But appellants make no such claim. The cost of the proper proceedings no matter how ill-founded is theirs. But petitioners do not mention the converse of their proposition, namely that the appellants are necessarily injured by the denial to them of the administrative process to which they are entitled. It is not the cost of having the hearing that is the injury, it is the harm to appellants from being denied it. Certainly the denial of a day in court on the issues of fact justifying the reopening of a final decree, and the further denial of a judicial review of any order resulting therefrom, is substantial harm. Nor in any event is such an allegation an essential part of a cause of action under the Declaratory Judgments Act or Administrative Procedure Act, cf. St. Regis Paper Co. v. United States, 368 U.S. 208 (1962).

4. Finally, the petition seeks to differentiate and to narrow the rule of Leedom v. Kyne, 358 U.S. 184 (1958) (Pet. 11, 12). It does so

upon the assumption that the ruling of this Court which the petition challenges was based upon that case. Actually, the opinion pointed out the potential applicability of Leedom v. Kyne (Op. 5) but went further to show (Op. 6) that the statutory interpretation which had to be made in Leedom v. Kyne was unnecessary in the present instance since the Commission had itself interpreted the statute in appellants' favor, thus making it unnecessary for the Court to do so. We believe this Court's opinion adequately answers petitioners' criticism. If more is required, there is a discussion of the background and holding of Leedom v. Kyne and its application to this case at pages 2 and 3 of appellants' reply brief on the appeal.

The Dissenting Opinion

The petition correctly notes (Pet. 11, ftn. 6) that the dissenting judge as a principal point distinguished Skinner and Eddy Corp. v. United States on the ground that there a final order was involved. We can only suggest that here too, we seek to review the enforceability of an order--the 1952 decree--which is "final" by the definition of the statute itself (15 U.S.C. §45(g))

> "(g) An order of the Commission to cease and desist shall become final--
>
> (1) Upon the expiration of the time allowed for filing a petition for review. . .but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b);. . .." (Emphasis added)

Conclusion

We respectfully submit that the Commission has failed to show either by analysis of the facts or citation of law that the challenged ruling of this Court has so radically departed from the normal course of decision as to require the extraordinary procedure of an en banc rehearing.

Respectfully submitted,

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April 8, 1965

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,559

The ELMO DIVISION OF
DRIVE-X COMPANY, INC., et al.,

Appellants,

v.

PAUL RAND DIXON, the FEDERAL
TRADE COMMISSION, et al.,

Appellees.

Appeal from Final Judgment of the United States District Court
for the District of Columbia

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REPLY BRIEF FOR APPELLANTS

I

The Statute

At no point do appellees in their answering brief meet, or even discuss, the single clear issue which this appeal presents — whether the Commission, having once issued a cease and desist order, can thereafter avoid compliance with the exclusive reopening procedure prescribed

by § 5(b) of the Federal Trade Commission Act [15 U.S.C. § 45(b)] and seek instead to modify the order through the technique of commencing a second proceeding and issuing a *de novo* complaint on the same facts. Appellees have so completely avoided the issue as to have submitted to this Court a nine-page brief discussing the powers of the Federal Trade Commission to modify an existing and final cease and desist order without once making reference to the controlling statute on the point.*

Presumably to be consistent with this omission, appellees then misdescribe the scope of appellants' case as being one resting solely upon former Commission Rule V(f), (p. 3). So there will be no misunderstanding, appellants repeat their primary reliance is upon the statute, and their secondary dependence is upon the Commission's own direction that the statutory reopening procedure — as incorporated in Rule V(f) — would govern any further modification of the order it was then issuing (ELMO, 48 FTC 1379, 1387; Complaint ¶2, J.A. 3).

It would appear that the purpose of appellees' avoidance of any reference to § 5(b) is to permit them to make the argument (p. 5) that *Leedom v. Kyne*, 358 U.S. 184 (1958), should not be accepted by this Court as authority for appellants' position since the Supreme Court in *Leedom* was concerned with a deprivation of procedural rights prescribed by a statute. On the same basis, appellees then argue that the Commission is not bound by its own Rule V(f) since "[no] statute or regulation preclude[s] the issuance of a new complaint against appellants" (p. 6).

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* The Commission itself has not been so reluctant to take direct issue with the statute. Since the filing of this appeal, the Commission has sustained an Examiner's ruling in the second proceeding against appellants, holding that the Commission has discretionary power either to modify an existing cease and desist order by reopening it in accordance with § 5(b) of the Act or, alternatively, by issuing a new complaint. [Docket No. 8615, June 10, 1964]

Since the procedural rights of which these plaintiffs have been deprived are also of statutory origin, *Leedom v. Kyne* is an authority directly in favor of the exercise of jurisdiction by the District Court in the present case. As the Supreme Court said:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate [a] determination of the Board because made in excess of its powers . . . we think the answer surely must be yes. This suit is not one to 'review' in the sense of that term as used in the Act a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act . . . *plainly, this was an attempted exercise of power that had been specifically withheld* . . . surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." [358 U.S. 184, 188-189, 79 S. Ct. 180, 183-184, 3 Lawyers Ed. 2d 210 (1958)]. (Emphasis added.)

II

Exhaustion of Administrative Remedies

As our first question, is it appellants or the Commission which is failing to exhaust the existing administrative remedy? Is it not the issue on this appeal to determine whether the administrative remedy to be exhausted is the reopening procedure under 15 U.S.C. § 45(b) in Docket 5959 or the second trial under the new complaint in Docket 8615? If the former, then it is the Commission which is refusing to exhaust the administrative remedy specified by Congress.

As we understand the argument of appellees on this point, it is that one may not complain of being tried twice if on future review one may be given the right to be tried three times, and that the second proceeding must be exhausted in order to show that the first is the proper

one. The precedents of this Court which appellees cite, *Miles*, *McFadden* and *Royal*, do not support such an assertion. This Court in *Miles Laboratories*, (as did the 8th Circuit in the cited *Adams* case) held that the federal courts would not predetermine the *merits* of the controversy before the Commission where the proceedings had been properly instituted. In *Miles*, the problem concerned the merits of the complaint; in *Adams*, whether the complaint was too indefinite or vague. In neither case was there any question of the power of the Commission to issue a complaint.

McFadden as an authority actually favors appellants' case here since this Court refused to review the substantive grounds for the issuance of administrative subpoenas where the Commission was acting *in accordance with its own regulation* under the statute. As to the *Royal Baking Powder* holding, this is not only the single precedent cited by appellees which involves the reopening of an order of the Federal Trade Commission but it wholly supports the point which appellants make on this appeal. This Court in that case held specifically that the type of reopening which appellants here seek was proper because it permitted the person to be charged to appear and show cause to the Commission why it should not be reopened — the very right which the Commission has in this case denied to these appellants.

While we believe these decisions favor appellants rather than appellees, it is also to be noted that all three rulings antedated the Administrative Procedure Act (1946) which specifically granted District Court review jurisdiction to ". . . interpret . . . statutory provisions, . [and to]. . set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observation of procedure required by law; . . ." And as pointed out in appellants' main brief (p. 16), it was recently held in *U. S. v. St. Regis Paper Co.*, 368 U.S. 208 (1961), that failure to apply to the Courts under the Administrative Procedure Act

and Declaratory Judgments Act before the end of a Federal Trade Commission procedure left any resulting harm as *damnum absque injuria*. And as we there showed, this Court has required the District Court to take jurisdiction of a matter during its pendency in Federal Trade Commission administrative proceedings (*B. F. Goodrich Co.*, p. 17). Appellees argue that these cases must be read as being limited to judicial intervention in cases of administrative delay (p. 5). There is no suggestion of a basis for such a limitation. If anything, delay is less prejudicial than a succession of retrials. Both involve failure of the agency to act in the authorized manner and fall within the basic scope of judicial supervision of the administrative process — to see that the process works within the procedures that the Congress has laid down (3 *Davis*, Adm. Law. 66, *et seq.*).

III

Injunction

The action is basically one for a declaratory judgment (J.A. 5). Whether the additional prayer for mandamus under the Declaratory Judgments Act or 28 U.S.C. § 1361 is appropriate will depend upon the nature of the decision of the District Court and whether, if it favors appellants, the Commission would not in any event comply with such a statutory interpretation without further order.

When the complaint was dismissed for lack of jurisdiction in the District Court, the then pending motion for a preliminary injunction became moot (J.A. 8). The application for a preliminary appellate injunction has been denied. While appellants do ask this Court to direct preliminary relief if the case is remanded and believe the facts given justify this, the issue is purely collateral, not affecting either the question of the District Court's jurisdiction or the Commission's powers.

IV

Exclusive Review

Appellees reiterate that the District Court lacks jurisdiction because this Court has exclusive review jurisdiction over Commission orders (pp. 3, 6). Appellees here also omit the statutory description of the orders which are made reviewable directly in this Court. They cite 15 U.S.C. § 45(d), but this refers solely to the filing provided in § 45(c) which as appellees must well know, is limited to "an order of the Commission to cease and desist," *Crown Zellerbach Corp. v. Federal Trade Commission,* 156 F.2d 927 (9th Cir. 1946). Since we are here concerned with the order of the Commission commencing a new action rather than a statutory review of the prior cease and desist order, the question of exclusive review in Courts of Appeal under the statute does not arise.

V

The Facts

Finally, appellees suggest there may exist "changed conditions and a new factual situation . . . different parties . . ." (p. 7). This is precisely the question at issue in a reopening under the statute. Moreover, as to this case, the Commission elected not to answer or to take issue with any of the complaint averments in the Court below and the case was heard therefore before the District Court and appealed to this Court solely on the facts as there set forth, directly alleging the identity of parties and issues. If the appellees consider that they have any evidence to support their present suppositions, it should have been made the subject of proof before the trial court, not recited as an original and unverifiable assertion of fact in an appellate brief.

VI

Conclusion

Appellants submit that appellees have failed to meet the issues on the appeal and have failed to show any lack of jurisdiction in the District Court to render a declaratory judgment as to whether the Federal Trade Commission is required to proceed pursuant to 15 U.S.C. § 45(b), and in accordance with its own Rules and prior agreement in reopening the existing cease and desist order against these appellants.

Respectfully submitted,

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